Thompson v. The Estate of Elliott et al.

[Indexed as: Thompson v. Elliott Estate]

Ontario Reports

Ontario Superior Court of Justice

MacLeod-Beliveau J.

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150 O.R. (3d) 625 | 2020 ONSC 1004

Case Summary

Real property — Co-ownership — Joint tenancy — Matrimonial home — Severance — Wife instructing lawyer to prepare new will to have her estate go to her adult children, and to sever joint tenancy of matrimonial home — Lawyer preparing will but neglecting to register transfer severing joint tenancy — Lawyer attempting to register transfer after wife's death — Notwithstanding improper procedure followed by lawyer, evidence established wife's clear intention to sever joint tenancy — Severance effected upon wife's signature of transfer documents.

Real property — Land titles — Registration — Wife instructing lawyer to prepare new will to have her estate go to her adult children, and to sever joint tenancy of matrimonial home — Lawyer preparing will but neglecting to register transfer severing joint tenancy — Lawyer attempting to register transfer after wife's death — Notwithstanding improper procedure followed by lawyer, evidence established wife's clear intention to sever joint tenancy — Severance effected upon wife's signature of transfer documents.

The applicant and his wife purchased a home as joint tenants in 2016. Shortly thereafter, the wife was admitted to hospital due to medical complications arising from her diabetes. In March 2017, she met with a lawyer in hospital to make a new will, as she wished to leave her estate to her adult children rather than to the applicant. She told the lawyer that her relationship with the applicant had broken down, that she wanted a divorce, and that she wanted to sever the joint tenancy to allow her share of the home to go to her children. The wife executed a will containing some typographical errors in the spelling of her name. The next day, two members of the lawyer's staff returned to the hospital and had the wife sign a corrected will and an Acknowledgment and Direction to sever the joint tenancy. In April 2017, the lawyer's office was informed that the wife had unexpectedly passed away. Upon retrieving the will file, it was discovered that the transfer severing the joint tenancy had not been registered at the Land Registry Office. The lawyer or a member of his staff immediately took steps to register the transfer. The home was sold in July, with co-operation between the applicant and representatives of the wife's estate. The documents registered by the estate trustees to transfer the property to the purchaser stated that the date of death was April 19, one day after the

registration date of the transfer to sever the joint tenancy, and four days after the actual date of death. The applicant took the position that the failure to register the severance before death resulted in a failure to sever, and as such he sought a declaration that upon his wife's death, all right and title to the home vested in him by right of survivorship.

Held, the application should be dismissed.

The applicant and the estate were declared to each have a half interest in the home as tenants in common. As the property had been sold through co-operation of the parties to arm's length purchasers, the declaration applied to the net proceeds of sale. The wife effectively and unilaterally severed her interest in the joint tenancy in March 2017, when she signed the acknowledgment and direction to transfer and [page626] gave immediate and unconditional instructions to register the transfer of severance. The respondents' evidence that the incorrect date of death on the transmission documents was a typographical error was rejected. It was inferred that the date was deliberately changed to prevent the documents from being rejected by the Land Registry Office. However, the lawyer's evidence in all other respects regarding his conversations and instruction regarding the making of a new will were found to be credible and reliable. The lawyer had sufficient instructions from the wife to effect her estate plan, which was not to provide the applicant with the assets of her estate, being mainly her half interest in the home. The evidence established that the wife understood the concept, nature and consequences of a joint tenancy and its right of survivorship upon death, which included an understanding of the necessity to register the severance without delay. It was the delivery, and not the actual registration, that determined whether a joint tenancy had been severed. It was found that at the time the wife signed the acknowledgment and direction, she had the clear intention to sever the joint tenancy immediately and unconditionally as well as the expectation that the document would be registered immediately. Rather than trying to register the transfer after the date of death, the lawyer ought to have brought an application in the Superior Court for a certificate of pending litigation and a declaration of an interest in land and for a vesting order.

Bank of Montreal v. Chu (1994), 17 O.R. (3d) 691, [1994] O.J. No. 388 (Gen. Div.); *Sammon (Re)* (1979), 22 O.R. (2d) 721, 94 D.L.R. (3d) 594 (C.A.); *Sproul Estate v. Sproul*, [2015] O.J. No. 598, 2015 ONSC 812 (S.C.J.), **consd**

Other cases referred to

Essery Estate v. Essery, [2016] O.J. No. 528, 2016 ONSC 321, 263 A.C.W.S. (3d) 863, 66 R.P.R. (5th) 307 (S.C.J.); *Felske Estate v. Donszelmann*, [2007] A.J. No. 1311, 2007 ABQB 682, 82 Alta. L.R. (4th) 181, 63 R.P.R. (4th) 276, 434 A.R. 323, [2008] 2 W.W.R. 154, 36 E.T.R. (3d) 293, 165 A.C.W.S. (3d) 197; *Hansen Estate v. Hansen* (2012), 109 O.R. (3d) 241, 2012 ONCA 112; *Hooper v. Hooper* (1953), [1953] O.R. 753, [1953] O.J. No. 297, [1953] 4 D.L.R. 443 (C.A.); *McKee and National Trust Co. Ltd. (Re)* (1975), 7 O.R. (2d) 614 (C.A.); *Murdoch and Barry* (1976), 10 O.R. (2d) 626 (H.C.J.); *Royal & SunAlliance Insurance Co. V. Muir*, [2011] O.J. No. 1688, 2011 ONSC 2273, 71 E.T.R. (3d) 37, 9 R.P.R. (5th) 104, 200 A.C.W.S. (3d) 1205 (S.C.J.); *Stonehouse v. British Columbia (Attorney-General)*, [1962] S.C.R. 103 (S.C.C.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 96 [as am.]

Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 42

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100

Family Law Act, R.S.O. 1990, c. F.3

Land Titles Act, R.S.O. 1950, c. 197 [rep.], s. 37, (2)

Land Titles Act, R.S.O. 1990, c. L.5, ss. 25(1), (2), 86(2)

Registry Act, R.S.O. 1990, c. R.20

Rules and regulations referred to

Electronic Registration, O. Reg. 19/99, s. 5(1) [as am.]

APPLICATION for a declaration of a vesting of an interest in land by right of survivorship.

Sheri Thompson, for applicant.

Jason A. Schmidt, for respondents. [page627]

MACLEOD-BELIVEAU J.: —

[1] This case is about a "zombie" deed.

[2] A "zombie" is a folklore reference to a person who is reanimated through magic after their death. In legal terms, a "zombie" deed is best understood as a transfer of an interest in land registered after the date of death of the grantor as if the grantor were still alive. Registration of transfers of this nature, if detected, are rejected for registration by the Land Registry Office.

[3] This case is about the legal consequences of a "zombie" deed/transfer, now called an Acknowledgement and Direction to transfer land, registered on behalf of Alitha Elizabeth Elliott, (hereinafter "Ms. Elliott"), by her lawyer after the date of her death in respect of the matrimonial home in Cobourg (hereinafter the "Cobourg property"), that she shared with the applicant, her husband, Mr. Byron Thompson (hereinafter "Mr. Thompson"), for the purpose of severing the joint tenancy.

[4] Mr. Thompson brings this application for a declaration of an interest in land. He seeks a declaration that upon the death of Ms. Elliott, all right, title and interest of Ms. Elliott in the Cobourg property was extinguished and vested in Mr. Thompson by right of survivorship.

The Issues

[5] The issue on this application is whether the delay and inadvertent error by Ms. Elliott's lawyer in failing to register the severance of the joint tenancy before her death results in a failure to sever the joint tenancy as of the date of her death?

[6] A further issue is whether there is enough evidence of Ms. Elliott's instructions to immediately sever the joint tenancy and to register the severance of the joint tenancy given to her lawyer while she was alive?

The Result

[7] The application is dismissed. A declaration of an interest in land shall issue that Mr. Thompson has a 50 per cent interest in the property as a tenant in common. The estate of Ms. Elliott and has a 50 per cent interest in the property as a tenant in common with Mr. Thompson. As the property has been sold to an arm's length purchaser, this declaration shall be applicable only to the distribution of the net proceeds of sale. The net sale proceeds shall be distributed accordingly, subject to any costs order subsequently made. Costs are reserved.

[8] The joint tenancy on the facts of this case was severed on March 27, 2017, when the Acknowledgement and Direction was signed by Ms. Elliott and unconditionally and immediately delivered [page628] to the lawyer with her intention that it would be immediately registered. I find there is enough evidence of delivery of the transfer and sufficientinstructions obtained by the lawyer to both sever the joint tenancy and to register the transfer severing the joint tenancy without delay.

[9] The severance of the joint tenancy was in law completed at the time Ms. Elliott signed the Acknowledgement and Direction to transfer to the lawyer and delivered it to the lawyer with her clear intention and instructions that the transfer was to be registered without delay. Through inadvertence by the lawyer, it was discovered that the transfer had not been registered prior to her death and had been left in her will file. The lawyer then, contrary to the expected practice of a lawyer, registered the transfer after her death and in so doing, made false and inaccurate law statements in the electronic registration system to enable the registration of the transfer to be accepted by the Land Registry Office as if Ms. Elliott were still alive.

[10] I find the lawyer erred by registering the "zombie" deed/transfer severing the joint tenancy in the property after Ms. Elliott's death based on his erroneous understanding that her instructions survived her death. Acourt application for a declaration of an interest in land is the proper legal procedure to follow by the lawyer to correct the error made by the lawyer after her death.

[11] The proper course of action to be taken by a lawyer in these circumstances upon the discovery of such an inadvertent error, is for the lawyer to bring an application in the Superior Court of Ontario requesting a certificate of pending litigation and a declaration of an interest in land and for a vesting order under s. 100 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to be made, setting out all the material facts in support of the application for an interest in land to be determined by the court.

[12] The aggrieved party should not have to discover the error made and then bring a court application for appropriate relief after the fact. The Land Registry Office cannot be misled with false and inaccurate law statements on transfer documents as to the true nature of the factual circumstances surrounding the transfer of an interest in land at the time of registration.

[13] "Zombie" deeds/transfers,"*Winarski* transfers" or "zombie" Acknowledgements and Directions to transfer land, are invalid and properly rejected for registration by the Land Registry Office and risk de-registration as the transferor(s) are deceased.

Position of the Parties

[14] The applicant Mr. Thompson is the aggrieved party. Mr. Thompson's position is that upon the death of Ms. Elliott, all right, [page629] title and interest of Ms. Elliott in the Cobourg property held in joint tenancy with Mr. Thompson was extinguished and vested in Mr. Thompson by the right of survivorship and that he holds a 100 per cent interest in the property. Mr. Thompson's position is that there is not enough evidence of Ms. Elliott's instructions given to her lawyer to sever the joint tenancy.

[15] The respondents are the estate of Ms. Elliott and Ms. Elliott's estate trustees, being her adult children. The respondents' position is that Ms. Elliott demonstrated a clear intention to unconditionally, effectively and unilaterally sever her interest in the joint tenancy on the date Ms. Elliott signed the Acknowledgement and Direction to transfer to the lawyer with the expectation that it would be immediately registered by the lawyer. Due to an error in her lawyer's office, the severance documents were not registered until three days after her death. It is the respondents' position that the joint tenancy in the subject property was severed and thatMr. Thompson is not entitled to a 100 per cent interest in the property by the right of survivorship, but rather, that Mr. Thompson is only entitled to a 50 per cent interest as a tenant in common, with the remaining 50 per cent interest being owned by the estate of Ms. Elliott as a tenant in common. Ms. Elliott's estate trustees' position is that there is enough evidence of Ms. Elliott's instructions given to her lawyer to sever the joint tenancy.

[16] The lawyer and his staff member involved in this matter who registered the "zombie" deed/transfer are not parties to this application. They have each filed a detailed affidavit, upon which they were cross-examined by opposing counsel.

Background Facts and Analysis

[17] Most of the facts in this case are not disputed. The factual difference between the parties is the degree and extent of Ms. Elliott's instructions given to her lawyer to sever the joint tenancy.

[18] Mr. Thompson and Ms. Elliott resided in a common law relationship from 2008 until they were married on February 14, 2014. It was a second marriage for Mr. Thompson and a third marriage for Ms. Elliott. Each of them had adult children from a previous marriage.

[19] On April 30, 2010, Mr. Thompson and Ms. Elliott purchased a home in Warkworth, Ontario as joint tenants. On July 7, 2016, they sold that home and purchased the Cobourg property, now in dispute, as their matrimonial home. Title to the Cobourg property was registered under the Land Titles system to Mr. Thompson and Ms. Elliott as joint tenants.

[20] In October of 2016, Ms. Elliott was admitted into hospital due to medical complications arising from her diabetes. Ms. Elliott [page630] remained in hospital until her unexpected death on April 15, 2017. After an alleged disagreement with Mr. Thompson, Ms. Elliott contacted a lawyer in March of 2017 and asked the lawyer to see her in hospital to make a new will as she now wished to leave her estate to her adult children, and not Mr. Thompson. There is now no issue that Ms. Elliott had capacity to make a new will and to sign the Acknowledgement and Direction in question in this application and to give instructions to her lawyer.

[21] On Saturday March 25, 2017, the lawyer and one of his legal assistants came to see Ms. Elliott in hospital. Ms. Elliott provided new will instructions to the lawyer who then quite properly made inquiries into the nature of her potential estate assets. The lawyer determined that most of Ms. Elliott's assets were the one-half interest she owned in joint tenancy in the Cobourg property with her husband Mr. Thompson. The lawyer had significant experience drafting wills and had been in practice for over 16 years. Specifically, Ms. Elliott did not want new Powers of Attorney prepared as she had recently already had them done, changing her powers of attorney from Mr. Thompson to her adult children. According to the lawyer, Ms. Elliott clearly conveyed to him that she wanted to sever the joint tenancy so that her share of the Cobourg property would go to her adult children and not to Mr. Thompson, as she intended to divorce him.

[22] According to the lawyer, Ms. Elliott discussed her relationship with her husband, Mr. Thompson. Ms. Elliott felt that her marital relationship had broken down and she wanted a divorce or possibly an annulment. The reasons she told the lawyer were that Mr. Thompson was verbally abusive to her and she was afraid of him; he did not provide her with her prescribed medication; he did not respect her decisions about her own personal care; he did not visit her after she agreed to move into a care home; he appeared to want to "pull the plug" (her words) on her; he appeared to place a greater importance on her assets rather than her personal health; and he appeared to have abandoned her while she was hospitalized.

[23] The lawyer returned the next day on Sunday March 26, 2017 with a staff member from his office and had the new will properly executed by Ms. Elliott. Ms. Elliott noticed that there were some typographical errors in the spelling of her name. The lawyer had Ms. Elliott sign the will in any event and advised Ms. Elliott that his staff would return the following day with her name corrected and with the documents to terminate the joint tenancy ownership of the Cobourg property.

[24] The lawyer then had two members of his staff return to the hospital on Monday March 27, 2017 to have Ms. Elliott sign the corrected will and the Acknowledgement and Direction to sever the [page631] joint tenancy in relation to the Cobourg property. It is not disputed that Mr. Thompson was unaware of these events. On March 29, 2017, the lawyer received a letter from Ms. Elliott's doctor that she had medical decision and financial making capacity at the relevant time.

[25] According to the lawyer, Ms. Elliott provided clear instructions to his office to register the severance of the joint tenancy and do what was necessary to ensure her adult children inherited her 50 per cent share of the Cobourg property.

[26] On April 18, 2017, one of Ms. Elliott's adult children called the lawyer's office to inform them that Ms. Elliott had sadly passed away. Upon retrieving Ms. Elliott's will file, the lawyer's office realized that the transfer severing the joint tenancy had not been registered and had been

left in error in her will file. That same day, the lawyer's office then immediately took steps to register the "zombie" deed/transfer at issue in this application.

[27] The requirements for the electronic registration of land transfers are regulated by the Ministry of Government and Consumer Services through Service Ontario and are detailed in their *Electronic Registration Procedures Guide* based upon existing legislation and regulations for the registration of documents affecting land in Ontario.

[28] The registration of the transfer to sever the joint tenancy on April 18, 2017 was clearly three days after the death of Ms. Elliott on April 15, 2017. In so doing, the lawyer would have had to make false and inaccurate *Family Law Act*, R.S.O. 1990, c. F.3 and age "law statements" (as they are called), stating that as of the registration date of the transfer, Ms. Elliott was "at least 18 years of age, a spouse and I am transferring to myself to sever joint tenancy, and that this document is not authorized under Power of Attorney" by her, when the lawyer knew or ought to have known that this was clearly not the case. These law statements are mandatory requirements for registration. Ms. Elliott was deceased. If that fact had been properly disclosed, the registration of the transfer of severance of the joint tenancy would have been properly rejected by the Land Registry Office. The Land Registry Office has time after a registration date, to review and reject a document for ultimate registration and to require the registering lawyer to re-register appropriately if errors are found.

[29] Ms. Elliott's March 26, 2017 will provided that her three adult children were her sole beneficiaries. Her beneficiaries then sought to sell the Cobourg property to realize the assets in her estate for distribution. They approached Mr. Thompson as to whether he wanted to sell his 50 per cent interest in the property at the same time. It was only then that Mr. Thompson became [page632] aware that a transfer to sever the joint tenancy had been registered on April 18, 2017.

[30] The property in Cobourg was subsequently sold for $310,000.00 on July 28, 2017 through co-operation by the parties. After payment of the mortgage principal balance outstanding as at the date of closing and other valid expenses of the sale, 100 per cent of the net proceeds of sale in the amount of $115,027.56 is being held in trust by the respondents' counsel pending final determination of the entitlement to the proceeds being determined by the court.

[31] In selling the property, the respondent estate trustees were also required to make honest and accurate law statements in the transmission application for the transfer of the property in the electronic registration system to transfer the property to the new purchaser as was their lawyer. The documents registered stated that Ms. Elliott's date of death was April 19, 2017, one day after the registration date of April 18, 2017 of the transfer to sever the joint tenancy, even though they knew or ought to have known that Ms. Elliott's death was on April 15, 2017.

[32] On March 22, 2018, this application was commenced by Mr. Thompson to determine his entitlement to the proceeds of sale of the Cobourg property.

[33] The evidence from the staff member in the lawyer's office confirmed that she had placed the executed transfer documents signed by Ms. Elliott in the wrong file. Her evidence was that the office was very busy at the time, and it was an oversight. When the transfer document was discovered, she registered it immediately. The lawyer under whose authority she acted is still fully responsible for all registrations done under his authority.

[34] "Zombie" deeds/transfers are highly problematic for several legitimate reasons. The Ontario Government's land transfer administrative policy overseen by the office of the Director of Titles, no longer allows "zombie" deeds/transfers to be registered in Ontario's electronic Land Titles system, and they will be rejected for registration if they are discovered.

[35] Some lawyers had been using "zombie" deeds/transfers as a method of trying to avoid probate taxes and fees. If there is no indication that the transfer is registered after death, the Land Registry Office will in fact not be able to tell if it is a "zombie" deed/transfer or not.

[36] This reality has created legitimate problems as to the transfer of land after death in Ontario as it allows for two types of registrations -- registrations done honestly and accurately based on truthful law statements, as they are called, in the electronic registration system by the lawyer at the time of registration of the [page633] transfer, and other registrations based on false and inaccurate law statements in the electronic registration system by the lawyer at the time of registration of the transfer.

[37] In a "zombie" deed/transfer situation, false and inaccurate law statements would have to be made by the lawyer that the transferor is over the age of 18 and what their marital status is, when in fact, the transferor is deceased. If the death of the transferor is honestly and accurately disclosed, the transfer registration will be properly rejected by the Land Registry Office for registration. Transfers of land by deceased persons' representatives must follow a different set of prescribed rules and regulations for legitimate reasons as set out in the *Land Titles Act*, R.S.O. 1990, c. L.5by way of an application for Transmission by a Personal Representative of an interest in land submitted by the estate representatives which includes proof of death of the deceased and other supporting documentation as the individual circumstances may require.

[38] In this case, the first notice registered with the Land Registry Office that Ms. Elliott was deceased was on July 28, 2017 in the transmission documents signed by her estate representatives registered in relation to the sale of the property on the same date to the new purchasers. The transmission documents state that Ms. Elliott's date of death was inaccurately April 19, 2017.

[39] On the facts, I do not accept and clearly reject the evidence, that the error made on the transmission documents by the estate representatives as to the actual date of Ms. Elliott's death was a typographical error. The evidentiary inference I draw from all the surrounding facts and circumstances of this case, the affidavit evidence filed and the cross-examinations held under oath, is that the date of death was changed from April 15, 2017 to April 19, 2017 to prevent the transmission transfer by the estate trustees to the new purchasers on July 28, 2017 from being rejected by the Land Registry Office and as a furtherance of the lawyer's inadvertence in not registering the transfer of severance of the joint tenancy before Ms. Elliott's death.

[40] I do, however, accept, and find to be reliable and credible, the lawyer's evidence in all other respects as to his conversations and instructions received from Ms. Elliott; her clear and unequivocal instructions to him in the preparation of her new will and the changing of her beneficiaries; her instructions in the signing of the Acknowledgement and Direction including, I find, Ms. Elliott's instructions to register the transfer to sever the joint tenancy without delay so that Mr. Thompson would not benefit from her death and become the sole owner of the Cobourg property. Ms. Elliott confirmed to the lawyer that she completely understood that by [page634] owning the home in joint tenancy, that her husband had a right of survivorship to her portion of

the property, meaning that upon her death the house would become his entirely. Ms. Elliott did not want this to occur. The lawyer's affidavit, together with his contemporaneous notes of the March 25, 2017 meeting with Ms. Elliott, satisfy me that the evidence is both necessary and reliable for admission as Ms. Elliott is now deceased.

[41] The parties disagree on the degree and extent of the instructions from Ms. Elliott to the lawyer to register the severance of the joint tenancy. While I agree that the lawyer could have made more detailed notes on that specific instruction, I am satisfied from his affidavit evidence and evidence given on cross-examination, that the lawyer had sufficient instructions from Ms. Elliott to effect her estate plan which was to not provide Mr. Thompson with the assets of her estate which was mainly her 50 per cent equity in the Cobourg property. Ms. Elliott intended to end her relationship with Mr. Thompson and to ultimately divorce him, and she did not wish her interest in the property to go to him when she died. I am satisfied that Ms. Elliott's instructions to the lawyer were very clear in this regard which would include her understanding of the necessity to register the severance of the joint tenancy without delay.

[42] Considering the evidence as at a whole, the inference I draw from the evidence is that Ms. Elliott very clearly understood who she wanted to inherit her estate, and that it was specifically not Mr. Thompson. Ms. Elliott had already removed Mr. Thompson as her power of attorney and substituted her children. The lawyer had many years of drafting wills and property transfer documents and in dealing with various clients in differing circumstances. He obtained a medical letter of competency. I find the lawyer had the necessary instructions to immediately register the transfer severing the joint tenancy. That registration was precisely what Ms. Elliott wanted and expected the lawyer to do immediately after the documents were signed on March 27, 2017. Ms. Elliott fully and unconditionally relinquished control of the documents to sever the joint tenancy and trusted that the lawyer would immediately register the severance documents.

[43] On the totality of the evidence, I draw the clear inference that the transfer documents were fully delivered by Ms. Elliott as the grantor for registration. Ms. Elliott's intention was clear that she wanted to solely benefit her children in her estate plan. What was unexpected was that Ms. Elliott would pass away so soon thereafter and that the lawyer would misplace the documents severing the joint tenancy in her will file and not in fact register them until after her death, which resulted in this litigation. [page635]

[44] The lawyer's evidence was that it was his belief that Ms. Elliott's intention in signing the transfer documents survived death, but that he stood to be corrected. It was the lawyer's belief that he could make the *Family Law Act* and age law statements as required for registration based on the date they were signed by Ms. Elliott, and not the date of registration of the transfer. The lawyer agreed that up until registration that the transfer documents could have been revoked by Ms. Elliott.

[45] I find that the lawyer is simply incorrect. While the intention to sever the joint tenancy may at common law survive death depending on all the factual circumstances of each individual case as determined by a court, I find it was improper for the lawyer to proceed to register the "zombie" deed/transfer after her death, as if Ms. Elliott was still alive, and to make what I find are false and inaccurate law statements of marital status and age to the Land Registry Office as at the date of the registration of the transfer.

[46] I am completely satisfied on the reliable and credible evidence before me, that Ms. Elliott understood the concept, nature and consequences of a joint tenancy and its right of survivorship upon death and that she no longer wanted Mr. Thompson to inherit her 50 per cent interest in the Cobourg property. Ms. Elliott had owned a home herself before she married Mr. Thompson. They then purchased a home together as joint tenants in Warkworth, and subsequently purchased the Cobourg property as joint tenants. The severance of the joint tenancy in the Cobourg property is completely consistent with Ms. Elliott's overall estate plan properly executed by the lawyer, as most of Ms. Elliott's estate assets was her 50 per cent interest in the Cobourg property.

[47] I have no reason whatsoever to question or doubt the lawyer's evidence as to the nature of the instructions given to him by Ms. Elliott and the clear intent of Ms. Elliott's instructions that she did not want Mr. Thompson to inherit any part of her estate or have any right of survivorship in the Cobourg property, the equity in which she clearly wanted her three adult children to inherit.

[48] There is no issue that a person can unilaterally sever a joint tenancy upon the execution of a transfer in land. It has been held that it must however be done before the person dies and cannot be done in a will or testamentary disposition, as by then, it is too late. The right of survivorship in those circumstances has already vested the property in the surviving tenant (see *Royal and Sun Alliance Insurance Company v. Muir*, [2011] O.J. No. 1688, 2011 ONSC 2273, at para. 25, Perell J.).

[49] The Ontario Court of Appeal has reviewed the common law in this area and has held in *Hansen Estate v. Hansen* (2012), 109 O.R. (3d) 241, [page636] 2012 ONCA 112, at paras. 32, 34, that there are three ways for someone to sever a joint tenancy during their lifetime:

1. by an act of any one of the persons interested operating on his or her own share;
2. by mutual agreement; and
3. any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

[50] It is the first way of severing a joint tenancy that is relevant and at issue in this case. A joint tenancy can be severed by transferring an interest jointly held with another from oneself to oneself. The property is then considered to be held as tenants in common with the former co-tenant. The joint tenancy is considered effectively destroyed (see s. 42 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34; *Murdoch v. Barry* (1976), 10 O.R. (2d) 626, at paras. 19, 22, Goodman J. (H.C.J.).

[51] The law in Ontario, I find, is settled and clear in that it is the delivery, and not the actual registration of the deed/transfer that determines if a joint tenancy has been severed. Whether or not a joint tenancy has been severed is a question of fact based on the evidence (see *Re McKee and National Trust Co. Ltd.* (1975), 7 O.R. (2d) 614 (C.A.), at p. 616). The onus is on the party seeking to establish the severance. In a disputed situation, the issues that are related to the ability to register a transfer severing a joint tenancy in the Land Titles system, and to provide notice to third parties, are secondary issues to be dealt with only after the ownership interest in

land has been determined based on the evidence surrounding the execution of the transfer of severance.

[52] The leading case by the Court of Appeal on delivery is *Sammon (Re)* (1979), 22 O.R. (2d) 721 (C.A.). In that case, the court held that there was insufficient evidence related to the intentions with respect to the registration of the deed/transfer severing the joint tenancy.

[53] In the *Sammon* case, Mr. Sammon signed a transfer severing the joint tenancy eight months before his death. Mr. Sammon and his wife had separated, and he had made a new will leaving his estate to his niece. From the time of the execution of the deed/transfer until his death, the signed deed/transfer remained in the office of his lawyer until it was registered after his death in accordance with Mr. Sammon's instructions. Mr. Sammon specifically did not want the transfer registered until after this death as he was afraid of initiating a serious dispute with his estranged wife [page637] if she found out about him signing the transfer severing the joint tenancy in their former matrimonial home.

[54] The trial judge held that the joint tenancy had not been severed as there was no "delivery" of the deed/transfer. The sole issue was whether there was an effective conveyance and that issue turned on whether there was, in law, a "delivery" of the deed/transfer. The Court of Appeal dismissed the appeal but in so doing, made several useful observations and findings in this area of the law. The court held that "delivery" is a matter of intention manifested by acts or words. The court further held that the existence of the requisite intention for delivery is a question of fact to be determined by the court.

[55] While the origin of the word "delivery" referred to the manual transfer of the document itself, the definition has been expanded in modern times. A transfer to be considered effectively "delivered" requires that the party whose transfer it is, must by words or conduct, expressly or impliedly acknowledge his or her intention to be *immediately and unconditionally bound* by the terms set out in the deed/ transfer. In *Sammon*, the Court of Appeal held that the evidence had not established that the grantor, Mr. Sammon, had intended to be immediately and unconditionally bound by the deed/transfer that he signed in that he had requested that it not be registered until after his death. Mr. Sammon's estate, therefore, failed to establish that Mr. Sammon had relinquished control over the deed/transfer to give effect to it immediately.

[56] Importantly, at p. 727 of the decision, the court states that a bald assertion that the intention was to sever the joint tenancy is not enough. The issue of delivery must be realistically assessed at the time of the execution of the deed/transfer with the entire situation in mind. Justice Morden then states that, "*if the grantor had instructed his lawyer to register the deed immediately, this would have been virtually conclusive evidence of delivery*".

[57] Mr. Schmidt relies on both the *Sammon* case and the case of *Winarski v. Sproul*, [2015] O.J. No. 598, 2015 ONSC 812 (Pattillo J.) on the issue that delivery, not registration determines severance of a joint tenancy. Ms. Thompson submitted that *Winarski* is distinguishable because it was decided during the era of Ontario's *Registry Act*, R.S.O. 1990, c. R.20 registration system. I disagree. I find that it was a *Land Titles Act* case.

[58] Ms. Thompson obtained the abstract of title for the property at issue in *Winarski.* The abstract confirmed that the propertywas originally in the land *Registry Act* system. Ann Sproul was the registered owner of 54 per cent and her son James Sproul was the registered owner of the other 46 per cent. On September 23, 2002, this property was converted into the *Land Titles*

Act system and [page638] given a property PIN number. On November 15, 2002, Ann Sproul signed a deed/transfer transferring her interest to her son James Sproul and gave it to her lawyer to register immediately and unconditionally.

[59] When the lawyer tried to register the deed/transfer, there was an execution against a person named "Sproul". The lawyer contacted James, but James never followed up and the deed/transfer was never registered. On January 11, 2011, Ann Sproul died. Pattillo J. held that the failure to register the deed/transfer did not have the effect of legally voiding the transfer as against the estate of Ann Sproul, based on *Carson v. Wilson*, at para.27. He further held that the fact that the deed/transfer was not registered may be relevant in respect of a claim by a third party without notice but not as against Ann Sproul or her Estate.

[60] In *Winarski*, the actual transfer/deed signed was never in fact registered at all and the forms used were the old forms used in the *Registry Act* system. Those documents would likely not have been accepted for registration, but the deed/transfer was never registered in any event. What happened was the parties brought a court application under the *Partition Act* and asked for other ancillary orders concerning the sale of the property. Justice Pattillo, in conclusion, made a declaration of an interest in land in that case that James was the sole owner of the property based on the fact that the deed/transfer was sufficiently delivered for registration by Ann Sproul to her lawyer.

[61] Case law prior to the implementation of Ontario's electronic registration system is still good law, as it is the evidence of the intention at the time of execution of the transfer document, be it a deed, transfer or now an Acknowledgement and Direction to transfer land, that is material to the determination of the issue of whether or not the transfer has been "delivered" or not.

[62] Lawyers that knowingly retain "zombie" deeds/transfers, "*Winarski* transfers" or Acknowledgements and Directions to transfer land in their files to register after the date of death of a transferor will find themselves unable to register those deeds/transfers and without recourse to the courts. Rather, lawyers must instead satisfy the court on an application that the deed/transfer was delivered and then retained in their file through inadvertence or some other legitimate reason and request a declaration of an interest in land from the court.

[63] *Winarski* does not stand for the principle or hold that lawyers may retain deeds/transfers and delay in registering those deeds/transfers of an interest in land post-mortem on the instructions of their clients, as it would require that lawyer to make false and inaccurate law statements in the land transfer documents at [page639] the time of time of registration in the Land Registry Office electronic registration system, which are dishonest and misleading.

[64] *Winarski* is consistent with *Sammon* in respect of when delivery occurred. In *Winarski*, there was express authority and instructions given to the lawyer to register the deed/transfer of land. It is the evidence of the intention at the time of execution of the transfer document, be it a deed, transfer, or now an Acknowledgement and Direction to transfer land, that is material to the determination of the issue of whether the transfer has been "delivered" or not.

[65] *Land Titles Act* registration requirements prohibit lawyers that knowingly retain "zombie" deeds/transfers in their files from registering them after the death of the transferor. They must instead satisfy the court on an application for a declaration of an interest in land that the transfer deed was delivered and then retained in their file through inadvertence or some other legitimate reason and request a declaration of an interest in land.

[66] In Ontario's present *Land Titles Act* system, a grantor/transferor does not actually sign the deed/transfer document itself. Rather, the electronic registration system provides that a person intending to transfer an interest in land signs instead, an Acknowledgement and Direction to the lawyer with a draft transfer attached, requesting that the transfer severing the joint tenancy be registered. Ontario's land registration system no longer requires the actual owner's signature on the document. The signing of the Acknowledgement and Direction form in today's system is, I find, the legal equivalent of signing the actual deed/transfer in the past.

[67] The lawyer then makes the necessary law statements and signs that the transfer documents are accurate *as at the time of registration* on behalf of the transferor. The law statements required to be signed by the lawyer include all the necessary details required to transfer an interest in land, including the fact the transferor is over 18 years of age and what the transferor's marital status is, to comply with all current provincial legislation. Section 5(1) of O. Reg. 19/99, made under the *Land Registration Reform Act*, provides:

> 5(1) In addition to the matters set out in section 4, a transfer submitted for electronic registration shall contain,
>
> (*a*) a statement of the consideration for which it was made;
>
> (*b*) a statement of the interest or estate transferred;
>
> (*c*) a statement that the transferor transfers the land that it affects;
>
> (*d*) *unless the transferor is a corporation, a statement by the transferor that the transferor is at least 18 years old*; [page640]
>
> (*e*) *unless the transferor is a corporation, a statement of spousal status under the Family Law Act by the transferor*[.]

(Emphasis added)

[68] Only a duly qualified lawyer can sign the necessary law statements and statements of completeness to register a transfer of an interest in land. Ontario's land registration system clearly relies on the expectation of honesty, integrity and accuracy of those lawyers' law statements by the lawyers who are authorized by law to make registrations within the electronic land registration system.

[69] Ms. Thompson argues that the Acknowledgement and Direction signed by Ms. Elliott is distinguishable from the deed/transfer which is attached thereto and that the signing of the Acknowledgement and Direction and instructions to her counsel are unable to constitute effective delivery for the purpose of severing the joint tenancy. I do not agree. This is the equivalent of saying that delivery and/or severance cannot be affected short of registration. This argument is contrary to relevant case law on the issues of delivery and the intentions of a party seeking to sever a joint tenancy or transfer an interest in land and is unsupported by any case law.

[70] I find that that the Acknowledgement and Direction to transfer land signed by Ms. Elliott is indistinguishable from the deed/transfer to which it relates and consider it to be the signature to affect the transfer of her interest in land. At the time Ms. Elliott signed the Acknowledgement and

Direction, I find further that Ms. Elliott gave clear instructions to the lawyer to make a new will and to not provide for any benefit to be conferred on Mr. Thompson as a result of her death including her interest in the Cobourg property.

[71] I find at the time Ms. Elliott signed the Acknowledgement and Direction that she had the clear intention to sever the joint tenancy *immediately and unconditionally* as well as the expectation that the document would be registered immediately by the lawyer so as to sever the joint tenancy and to put into place her estate plan to benefit only her three adult children and specifically not to provide any benefit to Mr. Thompson. I specifically reject Mr. Thompson's argument that a delivery and severance of a joint tenancy cannot be affected short of registration. I agree with Ms. Elliott's estate counsel that this submission is not the law in Ontario as to when a severance is considered "delivered".

[72] Other provincial case law from jurisdictions such as Alberta and British Columbia, have made similar findings even in the face of legislation in their land registration legislation that title does not pass until registration. It has been held that the rules of common law [page641] severance continue to operate in a land registry system, if they are not contrary to a legislative enactment (see *Felske Estate v. Donszelmann*, [2007] A.J. No. 1311, 2007 ABQB 682 for a general discussion of the issue, at paras. 32-42).

[73] The weight of judicial authority in Ontario is that an interest in land is conveyed at the moment any instrument is signed and a lawyer is instructed to register it, notwithstanding any legislative provisions that specify that an interest in land is conveyed upon registration. An unregistered interest in rare circumstances of mistake or error may arise in equity but may, however, be subject to subsequent, registered transfers to third parties without notice. Therefore, a joint tenancy can be severed without registration by conveying title in equity in applicable factual circumstances that would allow for it, upon a declaration of an interest in land being made by the court, and by subsequent registration of that court order on title.

[74] In *Hooper v. Hooper* (1953), [1953] O.R. 753, [1953] O.J. No. 297 (C.A.), Pickup C.J.O. held that the execution of a transfer deed by a transferor conveyed equitable title to the transferee notwithstanding a failure to register under the *Land Titles Act*, R.S.O. 1950, c. 197. Section 37 of the Act, as it then was, read as follows:

> 37(1) Every registered owner may, in the prescribed manner, transfer the land or any part thereof.
> (2) The transfer shall be completed by the proper master of titles entering on the register the transferee as owner of the land transferred, and until such entry is made the transferor shall be deemed to remain owner of the land.

[75] After considering s. 37 and other sections of the Act, at p. 758-759, the court concluded:

> I am of the opinion that the sections of *The Land Titles Act* referred to have not the effect contended for by counsel for the respondent. While the system may be said to be a system for registration of title, not of deeds, execution and delivery of the instrument of transfer in the prescribed form, particularly when accompanied by the affidavits requisite for registration, confers a title in equity until registration, and I think that such title is good for all purposes except as against some other title which may obtain priority by being recorded in the land

> titles office. Upon registration and completion of the transfer on the register, the transferee becomes fully protected against some other transfer which might, by prior registration, obtain priority and legal effect.

(Citations removed)

[76] Importantly, the court noted, at p. 759, that it would not have so held if there had been a specific legislative provision that "expressly provided that no instrument, until registered in the manner prescribed, should be effectual to pass any estate or interest in the land". The Act's wording has not changed much since *Hooper*. [page642]

[77] *The Land Titles Act*, R.S.O. 1990, c. L.5 presently provides as follows:

> *Effect of registration*
> 78(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.
>
> . . . . .
>
> *Priorities*
> (5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, despite any express, implied or constructive notice, are entitled to priority according to the time of registration.
>
> . . . . .
>
> *Transfer of land*
>
> 86(1) A registered owner may transfer land or any part thereof in the prescribed manner.
>
> *Registering transferee as owner*
> (2) The transfer shall be completed by the land registrar entering on the register the transferee as owner of the land transferred, and the transferor shall be deemed to remain owner of the land until the registration of the transfer has been completed in accordance with this Act.

[78] The Court of Appeal's key holding in *Hooper* is that the words "deemed to remain owner of the land" do not prohibit title in equity from passing from transferor to transferee notwithstanding a failure to register the transfer. As indicated, the current wording of s. 86(2) largely mirrors that of s. 37(2) in the old Act.

[79] Subsequent cases have affirmed the decision in *Hooper*. In *Bank of Montreal v. Chu* (1994), 17 O.R. (3d) 691, [1994] O.J. No. 388 (Gen. Div.), Wilson J. found that the defendant executed a deed that transferred all the interest she had in her home to her husband. The

defendant's lawyer through inadvertence forgot to register the transfer and it was not entered in the parcel register for two years. In the context of a bankruptcy proceeding, the court concluded it should assess whether fraudulent intent existed on the date of execution, rather than registration. At p. 703, the court stated that "The fact that the transfer was not registered in a timely way through a lawyer's inadvertence is not within the control of the applicant. The respondent bank should not benefit gratuitously as a result of the lawyer's error." [page643]

> [80] I agree with Wilson J.'s comments, at p. 702, that
> [a]t first blush, looking only at the statutory provisions, it appears that the intention of a conveyance is to be determined at the point of registration. However, a review of the case law under both the registry, and land titles systems confirms that intention and validity of an instrument as between the parties is determined on the date of execution rather than registration.

[81] Similarly, in *Essery Estate v. Essery*, [2016] O.J. No. 528, 2016 ONSC 321, Pattillo J. held that an Acknowledgement and Direction signed by the parties to transfer an interest in land was a "transfer" within s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 on the date that it was signed rather than the date that the lawyer submitted it for registration. In response to the submission that such a finding risked undermining the integrity of the *Land Titles Act* system, the court made the following comments [at paras. 44 and 45]:

> The Trustee submits that a determination that the "transfer" in s. 96(2) of the *BIA* means the date the transfer is executed as opposed to registered undermines the certainty of title that the land titles system is meant to protect. I disagree. As Chief Justice Pickup stated in *Hooper*, the transfer is valid as between the parties to it and good for all purposes except as against some other title which has priority based on registration.
> The Trustee also submits that if "transfer" in s. 96 of the *BIA* is interpreted to mean anything other than the date of registration in the land titles or registry systems a debtor could avoid a s. 96 application by executing a transfer to his or her spouse for no consideration, putting it in a drawer for five years and then registering it. In my view, such a scenario is highly unlikely. Even in such an unlikely event, the intent behind the initial transfer would have to be examined, including the reasons given for the lengthy delay in registration. In this case there is no such concern.

[82] In *Stonehouse v. British Columbia (Attorney-General)*, [1962] S.C.R. 103 (S.C.C.), a wife conveyed her half interest in the home that she held as a joint tenant with her husband to her daughter without registering the transfer deed. Justice Ritchie, on behalf of the court, quoted the relevant section of the Act, at p. 106:

> Except as against the person making the same, no instrument . . . executed and taking effect the thirtieth day of June, 1905, purported to transfer, charge, deal with, or affect land or any estate or interest therein, shall become operative to pass any estate or interest, either at law or in equity, in the land . . . until the instrument is registered in compliance with the provisions of this Act[.]

[83] Notwithstanding this apparent legislative prohibition, the Supreme Court held the transfer was valid and had the effect of severing the joint tenancy. At p. 107, the court, quoting an earlier authority, held that the words "'except as against the person making the same,' expressly make operative an unregistered instrument [page644] against the party making the same". Therefore, as Ms. Stonehouse was alienating her own interest in the land, the Act apparently did not apply to her. Later, at p. 108, the court commented:

> Under the provisions of sec. 35 an unregistered deed could not be operative "to pass any estate or interest either at law or in equity" other than that of the grantor, but the effect of Mrs. Munk's deed was not "*to pass*" any such estate or interest of Mr. Stonehouse but rather to change its character from that of a joint tenancy to that of a tenancy in common and thus to extinguish his right to claim title by survivorship which is an incident of the former but not of the latter type of interest. The right of survivorship under a joint tenancy is that, on the death of one joint tenant, his interest in the land passes to the other joint tenant or tenants (*Megarry and Wade, The Law of Real Property*, 2nd ed., p. 390). But, on the execution and delivery of the transfer by Mrs. Stonehouse, she divested herself of her entire interest in the land in question. At the time of her death, therefore, there was no interest in the land remaining in her which could pass to her husband by right of survivorship.

[84] The totality of the caselaw supports the principle of law that the intention and validity of an instrument *as between the parties* is determined on the date of execution rather than the date of registration.

[85] I now turn to how the transfer severing the joint tenancy in Ms. Elliott's case was in fact able to be registered after her death. It is clear from the evidentiary record before me that the lawyer in error failed to register the transfer as instructed by Ms. Elliott.To affect a solution to this predicament, the lawyer and/or his designated staff member went ahead and, I find, improperly registered the "zombie" deed/ transfer severing the joint tenancy using the incorrect date of death for Ms. Elliott in order that the transfer would not be rejected by the Land Registry Office.

[86] The lawyer inaccurately and falsely stated that Ms. Elliott, as at April 19, 2017 was over the age of 18 years and was a spouse, when in fact, he knew or ought to have known that she was deceased. The false law statements made, I find, were not typographical errors.The date of death was changed, I find, to avoid detection by the Land Registry Office and allow the severance transfer documents to be registered and not be rejected for registration.

[87] I find that the proper procedure to follow in these circumstances, is for the lawyer, immediately upon the discovery of the inadvertence and error made, to bring an application in the Superior Court of Ontario requesting a certificate of pending litigation and a declaration of an interest in land and for a vesting order under s. 100 of the *Courts of Justice Act*, setting out all the material facts in support of the inadvertence and the circumstances as to the delivery of the transfer, in an application to be determined by the court. Lawyers should not leave it up to the aggrieved party to [page645] find out about the inadvertence and force them to bring a court application for appropriate relief after the fact.

[88] "Zombie" deeds/transfers, "*Winarski* transfers", or Acknowledgements and Directions signed by deceased persons, I find, are not valid in law for registration in Ontario. A dead person cannot be revived to convey an interest in land in real life. Misleading the Land Registry Office

as to the true nature of the factual circumstances surrounding the transfer of an interest in land as at the time of registration in relation to a deceased person, or other transferors, is not valid.

[89] Attempted registration of "zombie" deeds/transfers, "*Winarski* transfers" or Acknowledgements and Directions signed by deceased persons, I find, are properly rejected for registration by the Land Registry Office as they are clearly not in compliance with current Government of Ontario registration regulations and requirements, imposed on lawyers using the electronic registration system for the transfer of an interest in land in Ontario.

[90] There is a proper method provided in the *Land Titles Act* for solving the problem. The *Land Titles Act* provides in s. 25(1) that land registrars shall obey the order of any competent court in relation to registered land. Section 25(2) provides that vesting orders for a freehold or leasehold interest in land or a charge shall be given effect to by the registrar.

[91] A court application to obtain a vesting order for a declaration that the estate of Ms. Elliott and Mr. Thompson each held a 50 per cent interest in the Cobourg property is the proper method of resolving the inadvertence and error of the non-registration of the transfer severing the joint tenancy by the lawyer prior to Ms. Elliott's death, rather than the course of action that the lawyer and/or his staff member actually chose to take in this case, of the registration of an invalid "zombie" deed/transfer after Ms. Elliott's death.

[92] As the Cobourg property in question on this application has been sold through co-operation of the parties to arm's length purchasers, and the net proceeds of sale have been held in trust awaiting the result of this litigation, it is unnecessary for me to make any declaratory orders setting aside the registered transfers made based on the erroneous information in this case by Ms. Elliott's lawyer and her estate trustees to affect the sale of the property. The declaration herein shall now be applicable only to the net proceeds of sale held in trust by the parties.

Conclusion

[93] For all the above reasons, I find that the respondents have established on the evidence a clear intention by Ms. Elliott to sever [page646] the joint tenancy in the Cobourg property and that there is enough evidence of Ms. Elliott's instructions to the lawyer to register the severance of the joint tenancy.

[94] I find that Ms. Elliott effectively and unilaterally severed her interest in the joint tenancy on March 27, 2017 when she signed the Acknowledgement and Direction to transfer and gave immediate and unconditional instructions to register the transfer of severance to her lawyer. Ms. Elliott relied upon those clear instructions given to the lawyer and there is no evidence of any contrary intention on her part. I find Ms. Elliott intended to be immediately and unconditionally bound by the document that she signed authorizing and directing the lawyer to register the transfer severing the joint tenancy without delay. I find the severance documents were in law delivered, and that the joint tenancy was in fact severed.

[95] The application is dismissed. A declaration of an interest in land shall issue that Mr. Thompson has a 50 per cent interest in the property as a tenant in common. The estate of Ms. Elliott and has a 50 per cent interest in the property as a tenant in common with Mr. Thompson. As the property has been sold to an arm's-length purchaser, this declaration shall be applicable

only to the distribution of the net proceeds of sale. The net sale proceeds shall be distributed accordingly, subject to any costs order subsequently made.

Costs

[96] Costs are reserved. The parties have advised that the quantum of costs has been agreed upon for this application in the amount of $7,500.00. There is no agreement, however, as to who should pay those costs. Considering my findings, an argument may be available that Mr. Thompson, as the unsuccessful party, should not pay costs and that costs not necessarily follow the event.

[97] If counsel are unable to agree on a final costs order, I will require brief written submissions on costs as follows: the respondents on behalf of Ms. Elliott being the successful party shall have until March 20, 2020 to file their submissions; Mr. Thompson shall have until March 31, 2020 to file his submissions; and reply if any to be filed by April 3, 2020 after which date the issue of costs will be determined by me.

[98] I thank both counsel for the concise nature of their argument in this case which was well presented to the court.

Application dismissed.
